IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS	:	
Plaintiff,	:	
v.		Case No. 8:18-cv-02098-CEH-JSS
	:	
BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN and the NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN	:	
	:	
Defendants.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS'/COUNTERPLAINTIFFS' MOTION TO COMPEL WRITTEN DISCOVERY AND DEPOSITION TESTIMONY

Plaintiff, Tyrone Keys ("Keys"), by and through his undersigned counsel and pursuant to Rule 3.01(b) of the Local Rules of the United States District Court for the Middle District of Florida, hereby files his Response In Opposition to Defendants'/Counter-Plaintiffs' Motion to Compel Written Discovery and Deposition Testimony ("Motion to Compel") (Doc. 42").

INTRODUCTION

Keys is a former player in the National Football League. In this action, Keys seeks reinstatement of his NFL-related disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Disability & Neurocognitive Benefit Plan ("Plans"). On June 24, 2019, the Defendant Plans filed Counterclaims against Keys for equitable relief under §1132(a)(3) of the Employee Retirement Income Security Act ("ERISA"). (Doc. 39).

A. Alleged Overpayment of Benefits

In order to analyze the Plans' entitlement to the discovery which is the subject of the

Plans' Motion to Compel, the Court must first understand the relief the Plans seek in their Counterclaims against Keys. At all times material hereto, the Plans provided two types of disability benefits: (i) line-of-duty ("LOD") disability benefits and (ii) total and permanent ("T&P") disability benefits.[1] LOD benefits are similar to a partial disability benefit; they are awarded to players who incur a "substantial disablement" arising out of NFL activities. T&P benefits are awarded to players who are totally and permanently disabled, *i.e.* substantially prevented from, or substantially unable to engage in, any occupation for remuneration or profit.

The Plans allege an overpayment of LOD benefits for a period of four years, from 1992 until 1996, and an overpayment of T&P disability benefits over a thirteen-year period, from 2004 until 2017. The overpayment of LOD benefits is alleged to have occurred because of an award of workers' compensation benefits that Keys received. Keys reported that workers' compensation benefits award to the Plans' administrators in 2003. The overpayment of T&P benefits is alleged to have occurred because Keys did not provide a complete progress note of a car accident that occurred in the spring of 2002 and did not mention the car accident as a cause of his impairments when he applied for T&P benefits in the fall of 2003. (Keys did not mention the car accident because it was not a cause of his disabling impairments in the fall of 2003).

The theory underlying the Plans' Counterclaims is that Keys' alleged omissions caused the Plans' administrators to improperly classify Keys as being disabled due to his pro football injuries and, since a football-caused T&P disability pays a higher monthly benefit under the Plans, the alleged omissions caused thirteen years of monthly overpayments. Thus, since August

[1] There are two classifications of T&P disability benefits that are relevant to this litigation: (1) Inactive A T&P disability benefits, formerly Football Degenerative T&P benefits, which are paid to plan participants who are disabled and whose disability is found by the Plans' administrators to have arisen from playing NFL football; and (2) Inactive B T&P disability benefits, formerly Inactive T&P benefits, awarded to players who the Plans' administrators find to be disabled but also find that their disability did not arise from playing NFL football.

2017, the Plans' administrators have offset Keys' non-football (Inactive B) monthly T&P disability benefit to collect the alleged overpayment of T&P benefits.[2] Now, in addition to offset, the Plans seek to trace the allege overpayments in an attempt to create an equitable lien against a fund or assets belonging to Keys. To that end, the Plans have propounded written discovery on Keys and also noticed depositions of Keys and his wife, Bessie Keys, for the purposes of tracing assets back to the alleged overpayments. Keys served responses to the Plans' written discovery requests on July 29, 2019. The deposition notices are attached as **Exhibit 1**. The Plans now move to compel Keys to provide "adequate responses" to the written discovery requests and to compel the scheduled depositions. For the reasons set forth below, the Plans' motion should be denied.

I. Defendants' Counterclaim of Overpayment and for Reimbursement of Line of Duty (LOD) Benefits is Improper Because Defendants Failed to Comply With Required ERISA Claims Procedures

The Defendants summarize their written discovery as "seven interrogatories and six requests for production focusing on: 1) "the amount of the LOD overpayment to Keys, and 2) whether Keys has funds or assets traceable to the LOD and T&P disability overpayments." Doc. 42 at p. 2. As it pertains to the alleged overpayment of LOD benefits to Keys and whether Keys has funds or assets traceable to the alleged LOD overpayments, the discovery is irrelevant. The Defendants' counterclaims alleging a right to reimbursement of overpaid LOD benefits are improper, and as a result any discovery in that regard is irrelevant because Keys was never provided notice of this "adverse benefit determination" prior to the counterclaims being made against him in this litigation.

The claims procedure rules for ERISA claims are established by the Secretary of the U.S.

[2] Defendants admit in their answer that the Board suspended Keys' Inactive B benefits to partially recover the alleged overpayment. Doc. 39, ¶31.

Department of Labor under the authority of 29 U.S.C. §1135. Under the claims procedures established by the Secretary, an "adverse benefit determination" includes an administrator's claim for a reduction of any paid benefits. 29 C.F.R. §2560.503-1(m)(4)(i). Notably, an adverse benefit determination requires a written denial notice and the opportunity for the plan participant to appeal with a full and fair review of the benefit reduction by a fiduciary. *Id*. Defendants' understanding of this requirement is best exemplified by the Retirement Board's final adverse benefit determination regarding T&P benefits, the culmination of the administrative claims process the Retirement Board initiated when it decided that Keys was overpaid T&P benefits and that the Retirement Board was entitled to reimbursement. *See* **Exhibit 3**, the Board's Final Decision on Review.

Keys reported to the Plans' administrators in 2003 that he received $39,000 in workers' compensation benefits in 1990. Nonetheless, prior to filing their counterclaims in this lawsuit that his LOD benefits were allegedly overpaid, the Plans' administrators never provided notice to Keys of the plan provisions upon which the Plans' administrators relied in making such a determination nor did the Plans' administrators ever provide Keys the opportunity to appeal such a determination.[3] The Board's Final Decision on Review, found in and taken from the Administrative Record, Keys_AR 05277-05287, is a denial of Keys' appeal regarding the alleged overpayment and collection of T&P disability benefits. Notably, that Final Decision on Review makes no reference to an alleged overpayment of LOD benefits. *See* **Exhibit 3**. The Defendants' assert that because overpayment and reimbursement claims are brought under ERISA's equitable

[3] Keys advised the Plans' Administrators in his T&P application in the fall of 2003 that he had received $39,000 in workers compensation benefits in 1990. *See* **Exhibit 2**, found in and taken from the Administrative Record, Keys_AR 00739-00744. The Defendants' allegation that Keys hid such information from the Plans' Administrators is untrue.

provision, 29 U.S.C. §1132(a)(3), such claims are exempt from the administrative claims process ERISA requires as a condition precedent to filing suit. *See* Doc. 42 at p. 6. Defendants are mistaken. They ignore that their LOD overpayment and reimbursement claim is dependent upon language in the plan allowing such a reduction and subsequent collection of the alleged overpayment, and therefore the claims and appeals process, *i.e.* exhaustion of administrative remedies, was required. They ignore that ERISA claims procedures require a written adverse benefit determination and the right of the plan participant to appeal anytime a plan administrator decides to reduce plan benefits.

In the denial of Keys' appeal, the Retirement Board explained that it was upholding its earlier denial of further Football Degenerative T&P benefits and upholding its prior decision that Keys had been overpaid $831,488.28 in T&P benefits, excluding interest. *Id*. As required by 29 C.F.R. §2560.503-1(j), the facts that allegedly supporting the Retirement Board's decision to reduce Keys' T&P disability benefits, along with the relevant plan provisions, were provided to Keys with the denial letter. *Id*. Conversely, there is no corresponding claim of overpayment and for reimbursement of LOD benefits in the Board's denial letter. *Id*. Keys was never given notice of any facts supporting such a claim, nor was he given any notice of the relevant plan provisions that supported the alleged claim. The first time Defendants asserted a claim for overpayment and for reimbursement of LOD benefits was in this litigation.

The Defendants cite *Reliance Standard Life Insurance Company v. Christin Smith*, 3:05-cv-467, 2006 WL 2993054, *3 (E.D. Tenn. Oct. 18, 2006) as support for their argument that the Plans' administrators were not required to exhaust administrative remedies before the Plans made their LOD counterclaim in this lawsuit. *See* Doc. 42 at p. 7. The facts in *Reliance* are easily distinguishable. The overpayment claim by Reliance did not originate from a reduction in

benefits due to an offset provision in the benefit plan. Hence, no adverse benefit determination and administrative appeal procedure were required in that case. Instead, Reliance mistakenly overpaid the plan beneficiary life insurance benefits due to clerical error, and the beneficiary refused to return the overpayment. *Id*. at 2. In contrast, in this case, the Defendants' counterclaim for overpayment of LOD benefits relies upon a claimed offset provision within the Retirement Plan that existed between 1992 and 1996 that allegedly allowed offset of LOD benefits by workers' compensation benefits. Such a claim requires a written adverse benefit determination and an administrative appeal prior to the Defendants' counterclaim.

Rule 26 permits discovery regarding non-privileged material that is relevant to any party's claim or defense. The Defendants' discovery attempting to trace funds to establish an equitable lien for alleged overpayment of LOD benefits is irrelevant because Defendants' failed to perfect their underlying claim for overpayment of LOD benefits and alleged right to reimbursement as required by 29 U.S.C. §1135 and 29 C.F.R. §2560.503-1(m)(4)(i). The Plans' administrators had the information to pursue such an administrative claim for a reduction in LOD benefits as early as the fall of 2003 and simply failed to do so. Having failed to exhaust their administrative remedies, the Defendants have not established their right to take discovery on their claims of alleged overpayment of LOD benefits.

2. **The Discovery the Plans Move to Compel to Support Their Claim of Overpayment and Reimbursement of T&P Benefits is Not Relevant**

As the Plans are well aware and have argued in other cases in Florida, when an ERISA case is to be decided under an abuse of discretion standard, discovery is extremely limited because the Court is acting much like an appellate tribunal and only "evaluates the reasonableness of an administrative determination in light of the record compiled before the

administrator." [4] *Epolito v. Prudential Ins. Co. of Am.*, 737 F. Supp. 2d 1364, 1369 (M.D. Fla. 2010). Thus, with limited exceptions, the Court's review is confined to the materials available to the Plans' administrators, *i.e.* the administrative record ("Administrative Record"). *Blankenship v. Metro. Life Ins. Co.* 644 F.3d 1350, 1354 (11th Cir. 2011). Generally, information that was not reviewed by a plan fiduciary when making a final decision on a benefit claim is not relevant to the Court's inquiry. However, some additional discovery has been allowed plaintiffs, including discovery that might reveal bias of the fiduciary or flesh out procedural irregularities. *Bloom v. Hartford Life and Accident Insurance Company*, 917 F. Supp. 2d 1269, 1278 (S.D. Fla. 2013).

The established rules that severely limit discovery in ERISA cases are not made inapplicable simply because the fiduciary makes a counterclaim for overpayment and seeks equitable relief under 29 U.S.C. §1132(a)(3). Here, the rules limiting discovery in ERISA cases is buttressed by the fact that the Plans' governing documents do not authorize the Plans to seek equitable relief under 29 U.S.C. §1132(a)(3) for an alleged overpayment of T&P benefits **in addition to** collecting the alleged overpayment by offsetting the Plaintiff's Inactive B T&P benefits.

The Defendants assert that "Courts routinely allow discovery of the type sought by the Plans because a plan's entitlement to equitable relief depends, in the first instance, on whether the participants holds funds or assets traceable to the overpayments." *See* Doc. 42, at 4. This is wrong as courts do not routinely allow discovery in response to a plan's reimbursement claim

[4] In response to the plaintiff's motion to compel discovery in *Ashmore v. NFL Player Disability & Neurocognitive Benefit Plan*, Case 9:16-cv-81710 previously pending in the United States District Court for the Southern District of Florida, the NFL Player Disability & Neurocognitive Benefit Plan urged the Court to deny the motion because "courts preclude or severely limit discovery in ERISA benefits cases." *See* Doc. 29 (Defendant's Response to Plaintiff's Motion to Compel) at p. 3.

under 20 U.S.C. §1132(a)(3). When a plan brings a claim for reimbursement under 29 U.S.C. §1132(a)(3), the court's initial and primary focus is on two issues: 1) whether the reimbursement claim complies with the ERISA remedial statute; and 2) what the plan terms require with respect to overpayment and reimbursement. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013). Courts do not routinely allow discovery when the governing plan or the provisions of ERISA do not allow the claim upon which the discovery is based. Sanctioning such a routine would permit irrelevant discovery in violation of Fed. R. Civ. P 26.

In *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), a case relied upon by Defendants, the Court's initial focus was on the terms of the plan. *Montanile* involved a third-party tort settlement for $500,000 and a reimbursement claim by a medical plan for $121,044.02 in benefits the medical plan had paid for the same injuries. In deciding that the case should be remanded to the trial court for a tracing of assets, the Court emphasized that the plan supported the reimbursement claim because it provided that "any amounts a participant recovers from another party by award, judgment, settlement or otherwise . . . will promptly be applied first to reimburse the plan in full." *Id*. at 655 (internal quotations omitted). In *Montanile*, the Court did not address the issue of discovery.

Years earlier, in the seminal ERISA reimbursement case brought by the plan administrator for reimbursement of paid medical benefits, *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the Court's initial focus was also on the terms of the plan. In *Knudson*, the health plan paid $411,157.11 in medical benefits to a plan participant for injuries caused by a car accident. The plan participant obtained a $650,000 settlement for that same car accident and the plan administrator, Great-West, sought reimbursement. In reviewing the claims made by Great-West, the Court emphasized that the plan "provides a reimbursement provision

that is the basis of the present lawsuit." *Id.* at 207.

Four years later, the Court decided *Sereboff v. Mid-Atlantic Medical Services, Inc*. 547 U.S. 356 (2006). The facts in *Sereboff*, and the Court's analysis of those facts, are also instructive here. In *Sereboff*, medical benefits in the amount of $74,869.37 were paid from an ERISA medical plan to treat the plan participant's injuries from a car accident. Again, the Court's initial and primary attention was directed to the terms of the plan. The Court relied on an "Acts of Third Parties" provision within the plan that was the basis of the plan's claim for reimbursement. *Id*. at 359.

Finally, in 2013 the Supreme Court decided *US Airways, Inc. v. McCutchen,* 569 U.S. 88 (2013), another case brought by a plan fiduciary under Section 1132(a)(3) of ERISA. In *McCutchen*, the plan fiduciary sought reimbursement for medical payments paid on behalf of a plan participant who was in a car accident and settled a personal injury suit. The plan fiduciary sought to establish an equitable lien for the amount paid by the plan, $66,866, from the plan participant. The Court held that the plan's terms trumped the plan participant's common law theory of unjust enrichment. The Court explained that §1132(a)(3) does not provide equitable relief "at large" but only allows equitable relief that enforces the terms of the plan or the statute. *Id*. at 100.

It is abundantly clear from reviewing Supreme Court precedent that in determining whether or not a plan has a valid claim for reimbursement under §1132(a)(3), the controlling factors are 1) whether the reimbursement claim complies with the ERISA remedial statute, and 2) the terms of the plan that address any potential overpayment and reimbursement. *Id.*

With respect to the Plans' claim for reimbursement of allegedly overpaid LOD benefits, the Plans did not clear the first hurdle. Specifically, the reimbursement claims do not comply

with the ERISA remedial statute and accompanying regulations because the Plans' administrators failed to exhaust their administrative remedies by providing written notice of the adverse benefit determination to Keys (the reduction in LOD benefits) and allowing Keys to appeal that claimed reduction in LOD benefits.

As elaborated upon below, with respect to the Plans' claims of overpayment and for reimbursement of allegedly overpaid T&P disability benefits, the Plans do not clear the second hurdle. Specifically, the terms of the plans do not allow the Plans to seek reimbursement of allegedly overpaid T&P benefits **in addition** to collection of the alleged overpayment of T&P benefits by offsetting T&P benefits that continue to be owed by the Plans.

A. The Plan Provisions at Issue

In making its overpayment and recoupment claims as to T&P disability benefits in the final administrative denial, the Retirement Board relied upon the overpayment and recoupment provision within the 2001 and 2014 Amended and Restated Bert Bell/Pete Rozelle NFL Player Retirement Plans. The 2001, 2011, and 2017 Amended and Restated NFL Player Retirement Plans are within the Administrative Record that has been assembled by the Plans. The overpayment and recoupment provisions are substantially similar. The 2014 Plan provision upon which the Retirement Board relied in making its final administrative decision to recoup alleged overpayments provides as follows:

> Section 12.12 Recovery of Certain Overpayments
>
> If false information submitted by or on behalf of a Player causes a Player to receive amounts under the Disability Plan to which such Player is not entitled, any future disability benefits payable to the Player or his beneficiary . . . will be reduced by the amount of the overpayment from the Disability Plan plus an interest rate of 6% per year.

See **Exhibit 3**; the quoted Section 12.12 from the 2014 Plan is at Keys_AR 05287.

The only other provision that addresses overpayment and recoupment is contained within Section 8.2 of the 2014 Plan, entitled "Authority." Section 8.2(o) authorizes the Retirement Board to "recover any overpayment of benefits through reduction or offset of future benefit payments **or other method chosen by the Retirement Board**." *See* **Exhibit 3**, Keys_AR 05286 (emphasis added). The Retirement Plans that have been made part of the Administrative Record, amended and restated as of April 1, 2001, August 1, 2011, and April 1, 2017, have essentially the same provisions regarding overpayment and recoupment. The first page and the overpayment and recoupment provisions of the Plans taken from the Administrative Record are attached as **Exhibit 4**.

As Defendants concede, the Plans' administrators have been offsetting Keys' Inactive T&P disability benefits since 2017. The Plans do not authorize the Plans' administrators to file a counterclaim in addition to exercising offset. Rather, the Plans' governing documents present an either-or proposition: **either** an offset of future benefits may be exercised to collect an alleged overpayment *or another method will be chosen by the Retirement Board.* In this case, the Plans' administrators elected to offset Inactive B benefit payments owed to Keys in order to collect the alleged overpayment of T&P benefits. Given that election, the Plans are not authorized to engage in additional collection efforts, such as discovery to trace financial assets to try and place a lien on a certain fund or property owned by a plan participant.

In summary, the plan terms control. *McCutchen,* 569 U.S. at 101. The Plans' administrators are not authorized to trace financial assets of a player in order to recoup an alleged overpayment of T&P disability benefits **in addition to** exercising an offset of disability benefits. Therefore, the written discovery and depositions that the Plans seek to compel as to their T&P

overpayment and reimbursement claims are not relevant and will not lead to the discovery of relevant evidence.

CONCLUSION

For the foregoing reasons, Plaintiff, Tyrone Keys, respectfully prays that the Defendants' Motion to Compel Written Discovery and Deposition Testimony be denied.

/s/ Lansing C. Scriven
LANSING C. SCRIVEN, ESQ.
Florida Bar No. 729353
LANSE SCRIVEN LAW
lanse@lansescriven.com
3903 Northdale Blvd., Suite 100e
Tampa, FL 33624
813/940-4000 (Telephone)
813/327-4828 (Facsimile)

--and--

JEFFREY DAHL, ESQ.
Texas State Bar No. 05310900
LAW OFFICE OF JEFFREY E. DAHL
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
210/527-0900 (Telephone)
210/527-0901 (Facsimile)
Attorneys for Plaintiff, Tyrone Keys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS'/COUNTERPLAINTIFFS' MOTION TO COMPEL WRITTEN DISCOVERY AND DEPOSITION TESTIMONY** has been electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that a true and correct copy of the foregoing will be furnished through the CM/ECF system to counsel of record on this **22nd** day of August, 2019.

/s/ Lansing C. Scriven